In The

Supreme Court of the United States

October Term, 1978

No. 79-533

ALICE MARIE JACKSON,

Appellant

v.

DAVID D. WHITE, ADMINISTRATOR OF THE ESTATE OF CLARENCE JACKSON, ET AL.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Alice Marie Jackson, the appellant, appeals from the final judgment of the Supreme Court of Ohio, dated July 3, 1979, holding that the provisions of Ohio Revised Code Chapter 2105, as applied to illegitimate children, do not constitute invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears in the Appendix hereto, p. A-3, *infra,* is reported at 59 Ohio St. 2d 6 (1979).

The opinion of the Franklin County Court of Appeals is not reported. It is reprinted in the Index hereto, p. A-13, *infra.*

The report of the Referee of the Common Pleas Court, Probate Division, of Franklin County is not reported. It is reprinted in the Index hereto, p. A-20, *infra.*

JURISDICTION

The judgment of the Supreme Court of Ohio, barring appellant from inheriting from the estate of her putative father, was entered on July 3, 1979.

A notice of appeal to this Court was duly filed in the Supreme Court of Ohio on September 26, 1979. See p. A-1, *infra.*

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the provisions of Ohio Revised Code, Chapter 2105, denying to one who is illegitimate any right to inherit from the natural father, unless the father has taken certain steps such as marrying the mother, acknowledging the child, designating the child as an heir-at-law, adoption or making a provision in a will, are violative of equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution: ". . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, § 2105.06:

"When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one child or his lineal descendants surviving, the first thirty thousand dollars if the spouse is the natural or adoptive parent of the child, or the first ten thousand dollars if the spouse is not the natural or adoptive parent of the child, plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or his lineal descendants, per stirpes;

(C) If there is a spouse and more than one child or their lineal descendants surviving, the first thirty thousand dollars, if the spouse is the natural or adoptive parent of one of the children, or the first ten thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

. . ."

Ohio Revised Code, § 2105.15:

"A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law

in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born. A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence. After a lapse of one year from the date of such designation, such declaration may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration."

Ohio Revised Code, § 2105.17:

"Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit or to whom she may transmit inheritance as if born in lawful wedlock."

Ohio Revised Code, § 2105.18:

"When a man has children by a woman and afterward intermarries with her, such issue, if acknowledged by him as his children, will be legitimate. The issue of parents whose marriage is null in law shall nevertheless be legitimate.

The natural father of a child by a woman unmarried at the time of the birth of such child, may file an application in the probate court of the county wherein he resides or in the county in which such child re-

sides, acknowledging that such child is his, and upon consent of the mother, or if she be deceased or incompetent, or has surrendered custody, upon the consent of the person or agency having custody of such child, or of a court having jurisdiction over the custody thereof, the probate court, if satisfied that the applicant is the natural father and that establishment of such relationship is for the best interest of such child, shall enter the finding of such fact upon its journal and thereafter such child shall be the child of the applicant as though born to him in lawful wedlock."

Revisions to Ohio Revised Code §§ 2105.17 and 2105.18 are reprinted in the Appendix hereto, p. A-25, *infra.*

RAISING THE FEDERAL QUESTION

At the earliest stage of the present proceedings, the Referee of the Court of Common Pleas, Probate Division, of Franklin County, discussed in detail the impact of *Labine v. Vincent,* (1971) 401 U.S. 532, upon the constitutionality of Ohio's strict requirements for inheritance of illegitimate children.

In the Court of Appeals the argument of appellant was summarized as follows:

> "In this appeal, appellant argues that the provisions of that Chapter, R.C. Chapter 2105, as applied to her, violate her right to equal protection of the laws. Specifically, appellant relies upon *Trimble v. Gordon, supra,* and *Green v. Woodard,* (1974) 40 Ohio App. 2d 101, in support of her proposition that the Ohio intestacy laws invideously discriminate against illegitimate children." (p. A-5, *infra.*)

The equal protection claim was ultimately certified to the Supreme Court of Ohio for review and final determination upon the following single question:

> "Whether the provisions of R.C. Chapter 2105 denying to one who is illegitimate any right to inherit from

the natural father, unless the father has taken certain steps such as marrying the mother, acknowledging the child, designating the child as an heir-at-law, adoption, or making a provision in a will, are violative of equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, section 2 of the Ohio Constitution." (p. A-3, *infra.*)

The Ohio Courts have thus considered and expressly rejected appellant's federal constitutional claim.

STATEMENT OF THE CASE

Clarence Jackson died testate in Columbus, Ohio, on the 17th day of January, 1975. The Will of the decedent was admitted to probate in the Court of Common Pleas of Franklin County, Ohio, Probate Division, on February 14, 1975. The decedent devised and bequeathed all property to his wife, Louise Jackson. There was no residuary clause nor were there any other provisions for alternative distribution in the event that Mr. Jackson's wife predeceased him. In fact, Louise Jackson did not survive the decedent.

Mr. David White was appointed Administrator of the estate of the decedent and instituted an action to determine heirship on August 4, 1975, naming appellant Alice Marie Jackson as one of the defendants.

On January 15, 1976, there was a hearing before a general Referee of the Probate Court. The sole issue for consideration was whether Alice Marie Jackson, as a purported illegitimate daughter of Clarence Jackson, could inherit from her father's estate.

Clarence Jackson had admittedly not taken affirmative steps to formally legitimate appellant or otherwise create rights of inheritance for her in accordance with Ohio Revised Code Chapter 2105. As a result, the evidence adduced at the January, 1976 hearing primarily consisted

of testimony from friends and acquaintances of Mr. Jackson that he admitted being Alice's father and that he brought Alice to his home immediately after her birth, where she was raised by his mother.

The report of the Referee was made on March 26, 1976, and found that appellant was not entitled to inherit from the estate of Clarence Jackson. The Honorable Richard B. Metcalf confirmed the report, and, after two motions to reconsider by appellant, judgment was entered on February 23, 1978.

An appeal from the judgment of the Common Pleas Court of Franklin County, Ohio, Probate Division, was made to the Tenth District Court of Appeals (Franklin County). The judgment of the Probate Court was thereafter affirmed on November 2, 1978.

On November 21, 1978, appellant moved the Court of Appeals for certification of its decision for the reason that it is in conflict with the decision and judgment of the Eighth District Court of Appeals (Cuyahoga County) in the case of *Green v. Woodard,* 40 Ohio App. 2d 101 (1974). The Court of Appeals entered judgment on December 26, 1978, concluding that this cause should be certified to the Supreme Court.

On April 24, 1979, the Ohio Supreme Court considered appellant's oral argument in the present case. In both the Court of Appeals and Ohio Supreme Court, the appellees declined to submit briefs and appear for oral argument.

The Ohio Supreme Court's decision affirming the lower Court's decisions was issued July 3, 1979.

THE QUESTION IS SUBSTANTIAL

This Court has had the recent opportunity to review the statutes pertaining to intestate succession for Illinois and New York in *Trimble v. Gordon,* (1977) 430 U.S. 762 52 L. Ed. 2d 31, and *Lalli v. Lalli,* (1978), ... U.S. ..., 58 L. Ed. 2d 503, respectively.

In *Lalli,* Mr. Justice Stewart's concurring opinion states:

> ". . . I cannot agree with the view expressed in the concurring opinion that *Trimble v. Gordon* is now 'a derelict', or with the implication that in deciding the two cases the way it has, this Court has failed to give authoritative guidance to the Courts and legislatures of the several states." 58 L. Ed. 2d at 516.

In the present case, it is abundantly clear that Ohio's provisions for intestate succession virtually mirror the constitutionally defective Illinois Probate Act. As Judge Palmer felicitiously notes in his dissenting opinion herein:

> "The only significant difference I have been able to determine between the statutes of the two states is that Ohio provides one additional method by which the father may recognize his illegitimate child for purposes of intestate succession, *viz.,* through a formal proceeding in Probate Court, initiated by the father, to designate such child as his heir at law R.C. 2105.15. Neither state, Illinois then and Ohio now, provides any method by which the *illegitimate child* may initiate any proceeding to secure parity of inheritance with legitimate children of his father.
>
> Does the existence in this state of one more device than was provided in Illinois by which the father might, should he elect to do so, secure an inheritance for his illegitimate child, remove this case from the *Trimble* rule? I should not have thought so." 59 Ohio St. 2d at 12. (Emphasis by author.)

A reasonable reading of the Ohio Supreme Court's majority opinion herein reveals an absence of any attempt to review Ohio's statute of intestate succession in light of the principles discussed in *Trimble, supra,* and *Lalli, supra.* How does a statutory plan of intestate succession for illegitimate children which is wholly dependent upon the choice of the natural father survive if *Trimble* is not "a derelict"? In *Trimble,* it is stated:

> "By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts." 430 U.S. at 774.

In the present case, the lower courts refused to make a factual determination regarding the relationship between the decedent and appellant. The "hearing" provided for appellant in the Probate Court was merely concerned with whether the putative father procedurally legitimated his daughter. As the report of the Referee states:

> ". . . notwithstanding the fact that Alice Marie Jackson may in fact be the illegitimate child of the deceased, Clarence Jackson, it is the finding of this Referee that she is not entitled to inherit from the estate of Clarence Jackson. Since counsel for Alice Jackson failed to offer any evidence establishing that the decedent father legitimatized his illegitimate daughter, and formally acknowledged his daughter in probate court, or adopted such daughter, or provided for her in his Will, or designated her as his heir at law, then this Referee must concur with the holding in *Moore v. Dague, supra,* that *absent such action on the part of the deceased,* Alice Marie Jackson cannot inherit from her father." (Index p. A-23, *infra.*) (Emphasis added.)

In the present case, the Ohio Supreme Court focuses solely upon the state interest involved in absolutely barring illegitimate children from proving paternity. Certainly, no effort is made to adequately consider the relation between Chapter 2105 and the state's objective of assuring effi-

cient disposition of property at death while avoiding spurious claims.

The New York law reviewed in *Lalli, supra,* survived the "rational basis test" because it provided for a reasonable "middle ground between the extremes of complete exclusion and case-by-case determination of paternity". *Trimble, supra,* at 771. Unlike the law of Ohio and Illinois, the New York statute did not make the rights of illegitimate children of intestate men wholly contingent upon some voluntary affirmative act of the father. Instead, illegitimate children are afforded access to courts to establish paternity and to secure their rights to inheritance. Rather than bearing the insurmountable burden of complete exclusion, the illegitimate children of New York must overcome a single *evidentiary* requirement. *Lalli, supra,* 58 L. Ed. 2d at 510, 511. Thus, unlike the law of Ohio and Illinois, the New York law does not result in the anomolous result of a judicial declaration of paternity being insufficient to permit inheritance. *Id* at 510. *In Re Minor of Martin,* (1977) 51 Ohio App. 2d 21 at 26, 27.

The Ohio Supreme Court defines the scope of the discrimination resulting from Chapter 2105 as follows:

> "The group 'discriminated against' is that class of illegitimate children whose fathers did not formally acknowledge them or designate them as heirs-at-law, pursuant to R.C. 2105.18 or 2105.15" 50 Ohio St. 2d at 11.

Chapter 2105 therefore effects a total statutory disinheritance of children born out of wedlock whose *fathers* choose not to legitimate them. The reach of Chapter 2105 is far in excess of its justifiable purposes. It is thus respectfully submitted the Courts of Ohio have failed to recognize the "authoritative guidance" provided by this Court in *Trimble, supra,* and *Lalli, supra.*

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,
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Cleveland, Ohio 44114

Of Counsel:
JOSEPH WATERMAN
PATRICIA S. KLERI
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Attorneys for Appellant

PROOF OF SERVICE

I, Joseph W. Bartunek, Attorney for Alice Marie Jackson, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of October, 1979, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On David D. White, Plaintiff-Appellee, and Harland Randolph, Erma Underwood, Easter Myricks, Katie Tarrent, Willa Mae Jackson McFadden, Adolph Banks, Clinton Banks, Cleveland Banks, and Willa Nell Banks Harl, Defendant-Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: William A. Toler
867 Mount Vernon Avenue
Columbus, Ohio 43203
Attorney for David D. White

TO: Robert Cohodes
17 South High Street
Columbus, Ohio 43215
Attorney for Harland Randolph, Erma Underwood, Easter Myricks, and Katie Tarrent

TO: Robert Refeld
33 South James Road
Columbus, Ohio 43213
Attorney for Willa Mae Jackson McFadden

TO: R. Scott Croswell II
906 Main Street
Cincinnati, Ohio 45202
Attorney for Adolph Banks, Clinton Banks, Cleveland Banks, and Willa Nell Banks Harl

JOSEPH W. BARTUNEK
Attorney for Appellant

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OHIO

No. { ALICE MARIE JACKSON, *Appellant*
— vs —
DAVID D. WHITE, *Administrator* of the Estate of Clarence Jackson, *et al., Appellees*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Alice Marie Jackson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio entered in this action on July 3, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The Clerk will please prepare the entire transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all exhibits.

JOSEPH W. BARTUNEK
1003 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114

PROOF OF SERVICE

I, Joseph W. Bartunek, Attorney for Alice Marie Jackson, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of September, 1979, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties, as follows:

1. On David D. White, Plaintiff-Appellee, and Harland Randolph, Erma Underwood, Easter Myricks, Katie Tarrent, Willa Mae Jackson McFadden, Adolph Banks, Clinton Banks, Cleveland Banks, and Willa Nell Banks Harl, Defendant-Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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906 Main Street
Cincinnati, Ohio 45202
Attorney for Adolph Banks, Clinton Banks,
Cleveland Banks, and Willa Nell Banks Harl

JOSEPH W. BARTUNEK
Attorney for Appellant

WHITE, ADMR., APPELLEE, *v.* RANDOLPH ET AL., APPELLEES; JACKSON, APPELLANT.

[Cite as White v. Randolph (1979), 50 Ohio St. 2d 6.]

Descent and distribution — Illegitimate children — Inheritance rights — Constitutionally of Ohio scheme.

(No. 79-5 — Decided July 3, 1979.)

CERTIFIED by the Court of Appeals for Franklin County.

Mr. Kelly M. Morgan and *Mr. Joseph Waterman,* for appellant.

Per Curiam. This cause was certified to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, for resolution of the conflict between the judgment of the Court of Appeals for Franklin County, in the cause *sub judice*, and the judgment of the Court of Appeals for Cuyahoga County in *Green* v. *Woodard* (1974), 40 Ohio App. 2d 101, 318 N. E. 2d 397. The issue certified for resolution is as follows: "Whether the provisions of R. C. Chapter 2105 denying to one who is illegitimate any right to inherit from the natural father, unless the father has taken certain steps such as *marrying* the mother, *acknowledging* the child, designating the child as an heir-at-law, adoption, or making a provision in a will, are violative of equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Ohio Constitution."

The unanimous opinion of the Court of Appeals in the cause at bar was written by Judge Robert E. Holmes, now a justice of this court. In our view, the position taken by Justice Holmes represents the correct one under the instant facts and, therefore, is incorporated at length:

"HOLMES, P. J.

"This appeal from a judgment of the Probate Division of the Franklin County Court of Common Pleas raises the issue of the constitutionality of Ohio's descent and distribution laws as they apply to illegitimate children. Although this court has previously sustained those statutory provisions in the face of an attack grounded upon the equal protection clause in *Moore v. Dague* (1975), 46 Ohio App. 2d 75, the recent decision in *Trimble* v. *Gordon* (1977), 97 S. Ct. 1459, necessitates a review of our prior holding on this issue.

"The facts relevant to this appeal are in brief that Clarence Jackson died testate on January 17, 1975. His will was duly admitted to probate. The will devised all of decedent's property to his wife, but failed to provide for its disposition in the event that she did not survive him. She did not.

"The administrator then brought this action in the Common Pleas Court of Franklin County, Probate Division, for a determination of decedent's heirs-at-law, joining appellant Alice Marie Jackson, who claimed to be decedent's illegitimate daughter, as one of the defendants. Following a hearing on the matter, Judge Metcalf held, as a matter of law, that appellant was not entitled to inherit from the estate of Clarence Jackson because she introduced no evidence tending to show:

"'° ° ° that the decedent, alleged father, legitimized his illegitimate daughter, or formally acknowledged his daughter in Probate Court, or adopted such daughter, or provided for her in his will, or designated her as his heir at law ° ° °.'

"In appellant's sole assignment of error, it is alleged that:

"'The court erred in determining that an illegitimate child may not inherit from her father's estate unless she was acknowledged to be the child of the decedent in accordance with O. R. C. 2105.18 during the decedent's lifetime.'

"In this appeal, appellant argues that the provisions of that chapter, R. C. Chapter 2105, as applied to her, violate her right to equal protection of the laws. Specifically, appellant relies upon *Trimble* v. *Gordon, supra,* and *Green* v. *Woodard* (1974), 40 Ohio App. 2d 101, in support of her proposition that the Ohio intestacy laws invidiously discriminate against illegitimate children.

"In Ohio, a child born out of wedlock is capable of inheriting from and through his mother, R. C. 2105.17, but may inherit from his father only under certain circumstances. As pointed out in *Moore, supra,* the father may legitimatize an illegitimate child by afterwards marrying the mother of the illegitimate child and acknowledging the child as his. R. C. 2105.18. Further, the natural father of an illegitimate child may confer upon such child a right of inheritance from such father by several means: (1) by formal acknowledgement in Probate Court that the child is his with consent of the mother (R. C. 2105.18); (2) by designating the illegitimate child as his heir-at-law (R. C. 2105.15); (3) by adopting the illegitimate child; and (4) by making a provision for the child in his will.

"Appellant concededly cannot meet any of the above criteria. However, appellant contends that the equal protection clause requires that she be permitted to inherit from decedent if she can establish with sufficient competent evidence that decedent is, in fact, her father. In the cases considering this general issue before us, it has been rather uniformly pointed out that the rationality of the classification must be examined in light of the legitimate state purposes to which it is related.

"It has long been recognized in Ohio that proof of paternity, especially after the death of the alleged father, is difficult, and peculiarly subject to abuse. One of the resultants of such abuse would be the instability of land titles of real estate left by intestate fathers of illegitimate children.

"The Supreme Court of the United States had previously recognized the stability of land titles as constituting a substantial state interest in the cases of *Labine* v. *Vincent* (1971), 401 U. S. 532, and *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U. S. 164. The Supreme Court reaffirmed this view in *Trimble, supra,* where in the opinion of Mr. Justice Powell, at footnote 12, page 1464, is to be found the following:

"'* * * In *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972), we found in *Labine* a recognition that judicial deference is appropriate when the challenged statute involves the "substantial state interest in providing for the stability of * * * land titles and in the prompt and definitive determination of the valid ownership of property left by decedents, * * *" 40€ U. S. at 170, 92 S. Ct., at 1404, quoting *Labine* v. *Vincent,* 229 So. 2d 449, 452 (La. App. 1969). We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self-evident, *Reed* v. *Reed,* 404 U. S. 71, 92 Ct. 251, 30 L. Ed. 2d 225 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. * * *'

"In *Trimble, supra,* the court struck down section 12 of the Illinois Probate Act which allowed an illegitimate child to inherit from his father only if the parents intermarried and the child was acknowledged by the father. The petitioner in *Trimble* had been previously adjudged to be the daughter of the decedent in an action for support brought during the decedent's lifetime. The court held

that the statutorily excluded class under Illinois law was over-inclusive in failure to allow those persons with a prior adjudication or formal acknowledgment of paternity to inherit. The court pointed out that in effect the Illinois law excluded *all* illegitimate children from inheriting from their father in that the sole provision for their being able to inherit would entail the marriage of the parents, and acknowledgement of the child by the father, which acts would legitimatize the child.

"The Supreme Court, in *Trimble,* recognized a middle ground between the extremes of complete exclusion and case-by-case determination of paternity that could allowably be included within state legislation. The court stated as follows, at page 1465 of the opinion:

"'The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between Section 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, Section 12 is constitutionally flawed.'

"As noted, *Trimble, supra,* raised the question of whether the class which was discriminated against was over-inclusive in light of the avowed statutory purpose. The court answered in the affirmative. While we may

envision situations in which persons placed within certain statutory classes may be victims of invidious discrimination, we do not believe that appellant has presented such a situation under the Ohio statutes in the case at bar.

"In conformity with the dictates of *Trimble*, we believe that the Ohio statutory provisions present a reasonable middle ground for the recognition of certain categories of illegitimate children of intestate men. Through these laws inheritance rights may be reasonably recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestate laws.

"Clearly, the Ohio classification scheme is rationally related to the legitimate state purpose of assuring efficient disposition of property at death while avoiding spurious claims. Moreover, the Ohio provisions do not discriminate between legitimate and illegitimate children *per se*. All children may inherit from their mothers. Some illegitimate children and all legitimate children may inherit from their fathers. The group 'discriminated against' is that class of illegitimate children whose fathers did not formally acknowledge them or designate them as heirs-at-law, pursuant to R. C. 2105.18 or R. C. 2105.15.

"We conclude that the provisions of R. C. Chapter 2105, as applied to appellant, do not constitute invidious discrimination under the equal protection clause of the Fourteenth Amendment. * * *"

Subsequent to the decision of the Court of Appeals in the instant cause, the United States Supreme Court, in the case of *Lalli* v. *Lalli* (1978), U. S. , 58 L. Ed 2d 503, upheld the constitutionality of a New York statute which allowed illegitimate children to inherit from their father only if a court of competent jurisdiction, during the father's lifetime, entered an order declaring the child's paternity.

Recognizing the difficulty of proving paternity and the possibility of fraudulent assertions of paternity upon

the estate of the decedent, the court found that the statutory differences afforded legitimate and illegitimate heirs under intestate succession were justified in furtherance of New York's substantial interest in the just and orderly disposition of property at death. In that regard, we conclude that the Ohio statutes in question in the cause at bar are substantially related to the important state interests discussed by the court in *Lalli, supra.*

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

PALMER, J., dissents.

PALMER, J., of the First Appellate District, sitting for HOLMES, J.

PALMER, J., dissenting. Because I can find no substantial basis for distinguishing the result reached by the United States Supreme Court in *Trimble* v. *Gordon* (1977), 430 U. S. 762, with respect to the Illinois Probate Act, from the case presented by R. C. Chapter 2105, I respectfully dissent.

In Illinois, the then Probate Act permitted an illegitimate child to inherit only from its mother, and not from its father, unless the father married the mother and acknowledged the child. The same options exist in this state, in disjunctive form, by virtue of R.C. 2105.18. In Illinois, *as in Ohio*, the father could frustrate the statute of intestate succession by making a will in favor of his illegiti-

mate child. In Illinois, *as in Ohio,* the father could formally adopt the child, thus making him an heir at law with the same status as a legitimate child. Illinois Probate Act Section 14, recodified at Ill. Rev. Stat. Chapter 110½, Section 2-4 (effective January 1, 1976). The only significant difference I have been able to determine between the statutes of the two states is that Ohio provides one additional method by which the father may recognize his illegitimate child for purposes of intestate succession, *viz.*, through a formal proceeding in Probate Court, initiated by the father, to designate such child as his heir at law. R. C. 2105.15. Neither state, Illinois then and Ohio now, provides any method by which the *illegitimate child* may initiate any proceeding to secure parity of inheritance with legitimate children of his father.

Does the existence in this state of one more device than was provided in Illinois by which the father might, should he elect to do so, secure an inheritance for his illegetimate child, remove this case from the *Trimble* rule? I should not have thought so.

"By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother *or by complying with the requirements of some other method of legitimation,* the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts." *Trimble* v. *Gordon, supra,* at page 774. (Emphasis added.)

The essential question posed by Mr. Justice Powell for the majority in the *Trimble* case remains, it seems to

me, unanswered by the presence in Ohio of one additional hypothetical method of legitimation beyond that provided by Illinois.

The state concededly has a substantial interest in promoting the orderly administration of intestate estates, and, as the *Trimble* court noted, the "serious problems of proving "paternity" might justify the creation, by statute, of relatively more demanding standards of proof for illegitimate children claiming under their fathers' estates. This consideration might, therefore, sustain an appropriate asymmetrical system of intestate devolution as one which "bear[s] some rational relationship to a legitimate state purpose," *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U. S. 164, 172, where adequate consideration can be shown to have been given to the relationship between the statute of descent and distribution and the state's proper objective of assuring accuracy and efficiency in the disposition of the property of an intestate. The *Trimble* court suggested a middle ground between the extremes of complete exclusion and a case-by-case determination, since:

"For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to properly passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed." *Trimble* v. *Gordon, supra,* at page 771.

Such acceptable middle ground was found in *Lalli* v. *Lalli* (1978), U.S. , 58 L. ED. 2d 503, where a New York statute permitted an illegitimate child to secure, during the lifetime of his father, an order of filiation from a court of competent jurisdiction and thus to establish his right as an heir at law of his father. Finding no violation of the Equal Protection Clause, the *Lalli* court distinguished the *Trimble* case, where the statutes worked a total disinheritance of illegitimate children absent some voluntary act of the father:

"* * * The reach of the [Illinois] statute was far in excess of its justifiable purposes. Section 4-1.2 does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock." *Lalli* v. *Lalli, supra,* at , 58 L. Ed. 2d, at page 514.

This state has no analogue to the New York statute, nor so far as I can see, any other "middle ground" approach to the problem. I conclude, therefore, that so long as *Trimble* states the law of the land, the Ohio statute of descent and distribution violates the right of illegitimate children of intestate fathers to the equal protection of laws under the Fourteenth Amendment.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

DAVID D. WHITE, Administrator,
of the Estate of Clarence Jackson,
Plaintiff-Appellee,

v.

ALICE MARIE JACKSON,
Defendant-Appellant,

HARLAND THOMAS RANDOLPH, et al.,
Defendants-Appellees.

No. 78AP-169

DECISION

Rendered on November 2, 1978

BELL, WHITE & SAUNDERS,
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and

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For Adolph Banks.

HOLMES, P. J.

This appeal from a judgment of the Probate Division of the Franklin County Court of Common Pleas raises the issue of the constitutionality of Ohio's descent and distribution laws as they apply to illegitimate children. Although this court has previously sustained those statutory provisions in the face of an attack grounded upon the equal protection clause in *Moore v. Dague* (1975), 46 Ohio App. 2d 75, the recent decision in *Trimble v. Gordon*

(1977), 97 S. Ct. 1459, necessitates a review of our prior holding on this issue.

The facts relevant to this appeal are in brief that Clarence Jackson died testate on January 17, 1975. His will was duly admitted to probate. The will devised all of decedent's property to his wife, but failed to provide for its disposition in the event that she did not survive him. She did not.

The administrator then brought this action in the Common Pleas Court of Franklin County, Probate Division, for a determination of decedent's heirs-at-law, joining appellant Alice Marie Jackson, who claimed to be decedent's illegitimate daughter, as one of the defendants. Following a hearing on the matter, Judge Metcalf held, as a matter of law, that appellant was not entitled to inherit from the estate of Clarence Jackson because she introduced no evidence tending to show:

> "* * * that the decedent, alleged father, legitimized his illegitimate daughter, or formally acknowledged his daughter in Probate Court, or adopted such daughter, or provided for her in his will, or designated her as his heir at law * * *."

In appellant's sole assignment of error, it is alleged that:

> "The court erred in determining that an illegitimate child may not inherit from her father's estate unless she was acknowledged to be the child of the decedent in accordance with O.R.C. 2105.18 during the decedent's lifetime."

In this appeal, appellant argues that the provisions of that chapter, R. C. Chapter 2105, as applied to her, violate her right to equal protection of the laws. Specifically, appellant relies upon *Trimble v. Gordon, supra,* and *Green v. Woodard* (1974), 40 Ohio App. 2d 101, in support of her proposition that the Ohio intestacy laws invidiously discriminate against illegitimate children.

In Ohio, a child born out of wedlock is capable of inheriting from and through his mother, R. C. 2105.17, but may inherit from his father only under certain circumstances. As pointed out in *Moore, supra,* the father may legitimatize an illegitimate child by afterwards marrying the mother of the illegitimate child and acknowledging the child as his. R. C. 2105.18. Further, the natural father of an illegitimate child may confer upon such child a right of inheritance from such father by several means: (1) by formal acknowledgement in Probate Court that the child is his with consent of the mother (R. C. 2105.18); (2) by designating the illegitimate child as his heir-at-law (R. C. 2105.15); (3) by adopting the illegitimate child; and (4) by making a provision for the child in his will.

Appellant concededly cannot meet any of the above criteria. However, appellant contends that the equal protection clause requires that she be permitted to inherit from decedent if she can establish with sufficient competent evidence that decedent is, in fact, her father. In the cases considering this general issue before us, it has been rather uniformly pointed out that the rationality of the classification must be examined in light of the legitimate state purposes to which it is related.

It has long been recognized in Ohio that proof of paternity, especially after the death of the alleged father, is difficult, and peculiarly subject to abuse. One of the resultants of such abuse would be the instability of land titles of real estate left by intestate fathers of illegitimate children.

The Supreme Court of the United States had previously recognized the stability of land titles as constituting a substantial state interest in the cases of *Labine v. Vincent* (1971), 401 U.S. 532, and *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164. The Supreme Court reaffirmed this view in *Trimble, supra,* wherein the opinion of Mr. Justice Powell, at footnote 12, page 1464, is to be found the following:

> "* * * In *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), we found in *Labine* a recognition that judicial deference is appropriate when the challenged statute involves the 'substantial state interest in providing for the stability of * * * land titles and in the prompt and definitive determination of the valid ownership of property left by decedents, * * *' 406 U. S. at 170, 92 S.Ct., at 1404, quoting *Labine* v. *Vincent,* 229 So. 2d 449, 452 (La. App. 1969). We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self-evident, *Reed* v. *Reed,* 404 U. S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. * * *"

In *Trimble, supra,* the court struck down section 12 of the Illinois Probate Act which allowed an illegitimate child to inherit from his father only if the parents intermarried and the child was acknowledged by the father. The petitioner in *Trimble* had been previously adjudged to be the daughter of the decedent in an action for support brought during the decedent's lifetime. The court held that the statutorily excluded class under Illinois law was overinclusive in failing to allow those persons with a prior adjudication or formal acknowledgement of paternity to inherit. The court pointed out that in effect the Illinois law excluded *all* illegitimate children from inheriting from their father in that the sole provision for their being able to inherit would entail the marriage of the parents, and acknowledgement of the child by the father, which acts would legitimatize the child.

The Supreme Court, in *Trimble,* recognized a middle ground between the extremes of complete exclusion and case-by-case determination of paternity that could allowably be included within state legislation. The court stated as follows, at page 1465 of the opinion:

"The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed."

As noted, *Trimble, supra,* raised the question of whether the class which was discriminated against was over-inclusive in light of the avowed statutory purpose. The court answered in the affirmative. While we may envision situations in which persons placed within certain statutory classes may be victims of invidious discrimination, we do not believe that appellant has presented such a situation under the Ohio statutes in the case at bar.

In conformity with the dictates of *Trimble,* we believe that the Ohio statutory provisions present a reasonable middle ground for the recognition of certain categories of illegitimate children of intestate men. Through these laws inheritance rights may be reasonably recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestate laws.

Clearly, the Ohio classification scheme is rationally related to the legitimate state purpose of assuring efficient disposition of property at death while avoiding spurious claims. Moreover, the Ohio provisions do not discriminate

between legitimate and illegitimate children *per se.* All children may inherit from their mothers. Some illegitimate children and all legitimate children may inherit from their fathers. The group "discriminated against" is that class of illegitimate children whose fathers did not formally acknowledge them or designate them as heirs-at-law, pursuant to R. C. 2105.18 or R. C. 2105.15.

We conclude that the provisions of R. C. Chapter 2105, as applied to appellant, do not constitute invidious discrimination under the equal protection clause of the Fourteenth Amendment. In so deciding, we reaffirm our disagreement with the decision of the Court of Appeals for the Eighth District in *Green* v. *Woodard* (1974), 40 Ohio App. 2d 101. See *Moore, supra,* 46 Ohio App. 2d, at page 80.

For all of the foregoing reasons, appellant's assignment of error is dismissed, and the judgment of the Franklin County Court of Common Pleas, Probate Division, is hereby affirmed.

WHITESIDE and McCORMAC, JJ., concur.

FILED
RICHARD B. METCALF
PROBATE JUDGE
MAR. 29, 1976

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO PROBATE DIVISION

0214 1060

DAVID D. WHITE, Administrator of the Estate of Clarence Jackson,
Plaintiff

vs.

HARLAND THOMAS RANDOLPH, et al
Defendants

Case No. 298394-A
REPORT OF GENERAL REFEREE
March 26, 1976

TO THE HONORABLE RICHARD B. METCALF,
JUDGE OF THE PROBATE COURT OF
FRANKLIN COUNTY, OHIO

Pursuant to a prior order referring the above-entitled proceedings to me for hearing and report, I proceeded under the provisions of Section 2315.37 Ohio Revised Code, to hear and examine such proceedings and respectfully submit the following report thereon.

This matter came on for hearing before this Court on the 15th day of January 1976 on the complaint of the Administrator to determine the heirs of Clarence Jackson. All parties in interest were before the Court by service upon them by certified mail, service by publication, or representation of counsel. Mr. Robert Cohodes represented Harland Thomas Randolph, Erma Nell Underwood, Easter Mae Myricks, and Katie Tarrent. Mr. Robert Refeld represented Willa Jessie Mae Jackson McFadden. Mr. R. Scott Croswell represented Adolph Banks, Clinton Banks, Cleveland Banks and Willa Nell Banks Harl. Mr. Joseph Waterman represented Alice Marie Jackson.

By stipulation and agreement of the parties, the sole issue for consideration was the claim of Alice Marie Jackson, the purported illegitimate daughter of Clarence Jackson.

STATEMENT OF FACTS

Clarence Jackson died testate on the 17th day of January 1975. The Will of the decedent was duly admitted to probate on the 14th day of February 1975. Mr. David White was appointed by this Court as Administrator With Will Annexed on the 14th day of February 1975.

The Will of the decedent devised and bequeathed all property to his wife, Louise Jackson. There was no residuary clause nor was there terminology in the event Louise Jackson had predeceased Mr. Jackson. In fact Louise Jackson did not survive the deceased. Therefore Mr. White filed his complaint to determine heirs on August 7, 1975.

CONCLUSIONS OF LAW

The sole question for consideration by the Court is whether an illegitimate child may inherit from her father.

Briefs were not prepared or presented to the Court and the case proceeded to be heard upon the oral testimony of a number of witnesses called on behalf of Alice Marie Jackson.

Ohio courts have dealt with this precise issue as recent as October, 1975. See *Moore* v. *Dague et al*, Court of Appeals, Franklin County Ohio (NO 75 AP – 200 Decided October 7, 1975). Also *Green* v. *Woodard* (1974) 40 Ohio App 2d 101. The issue in the *Moore* case, supra, dealt with the rights of an illegitimate son to inherit from his father's estate and to further maintain an action to contest a will. Upon careful analysis of both the *Moore* case, supra, and the *Green* case, supra, it is clear that the

Court of Appeals has examined both the common law and the statutory law with respect to inheritance by illegitimate children from or through their fathers. As the Court stated on page 3 in the *Moore* case, supra,

> "It has remained the law of Ohio, unchanged by the statute of descent and distribution, R. C. 2105.06, that an illegitimate child cannot inherit from or through his natural father unless the father takes some steps during his lifetime to permit such inheritance. BLACKWELL v. BOWMAN (1948), 150 Ohio St. 34. The father may legitimatize an illegitimate child by afterwards marrying his mother and acknowledging the child as his; R.C. 2105.18. Children of an invalid marriage are legitimate; R.C. 2105.18. The natural father of an illegitimate child may confer upon such child a right of inheritance from such father by several means: (1) by formal acknowledgement in probate court that the child is his with consent of the mother (R.C. 2105.18); (2) by designating the illegitimate child as his heir at law (R.C. 2105.15); (3) by adopting such illegitimate child; and (4) by making provision for such illegitimate child in his will."

Although the defendant Alice Marie Jackson did not argue the constitutional questions raised in *Moore* supra, and *Green*, supra, the United States Supreme Court has expressly held constitutional a state law denying an illegitimate child any right from inheriting by intestate succession from his natural father. *Labine* v. *Vincent* (1971), 401 U.S. 532, 91 S. Ct. 1017. Furthermore, the Court of Appeals in *Moore*, supra, specifically dealt with the *Labine* case, and *Greene* case, and would not accept the reasoning in the *Green* case that all "children", whether legitimate or illegitimate, should be entitled to inherit under O.R.C. 2105.06 from both mother and father and that to preclude such inheritance from the father is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Court in

Moore went on to state that under existing common law and R.C. 2105.06 *all* illegitimate children are denied rights of inheritance from their father and that no invidious discrimination existed in violation of the equal protection clause. On page 11 of the opinion the Court states:

> "We find no invidious discrimination constituting an unconstitutional denial of the equal protection of the law in the application of the Ohio law denying to the illegitimate any right to inherit from the natural father, unless the father has provided for such inheritance."

In the case before this referee, there was testimony by friends and acquaintances concerning statements made by the deceased that Alice was the daughter of the deceased. On cross examination, the witnesses could not swear to the truthfulness of those statements made by the deceased but only to the fact that they were made. It appeared that as far as the testimony went, the relationship between the deceased and Alice Jackson was one in which the witnesses inferred and took for granted that Clarence Jackson was the father. Testimony was also given that the deceased brought Alice home from the hospital and she was subsequently raised by the decedent's mother, Mrs. Jones.

At the conclusion of the defendant Alice Jackson's case, a motion for a directed verdict was made on behalf of the other defendants, and this Court took the matter under advisement. Based upon the evidence presented this Referee finds that the motion for a directed verdict is overruled. However, notwithstanding the fact that Alice Marie Jackson may in fact be the illegitimate child of the deceased, Clarence Jackson, it is the finding of this Referee that she is not entitled to inherit from the estate of Clarence Jackson. Since counsel for Alice Jackson failed to offer any evidence establishing that the decedent father legitimatized his illegitimate daughter, and formally

acknowledged his daughter in probate court, or adopted such daughter, or provided for her in his Will, or designated her as his heir at law, then this Referee must concur with the holding in *Moore* v. *Dague* supra, that absent such action on the part of the deceased, Alice Marie Jackson cannot inherit from her father.

Respectfully submitted

THOMAS L. HORVATH
General Referee

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§ 2105.17 [Children born out of wedlock.]

Children born out of wedlock shall be capable of inheriting or transmitting inheritance from and to their mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, as if born in lawful wedlock.

HISTORY: GC § 10503-14; 114 v 320 (342); 136 v S 145, Eff 1-1-76.

§ 2105.18 [Illegitimate child; acknowledgment by natural father.]

When a man has a child by a woman before or after the birth intermarries with her, the child is legitimate. The issue of parents whose marriage is null in law are nevertheless legitimate.
The natural father of a child may file an application in the probate court of the country in which he resides, in the county in which the child resides, or the county in which the child was born, acknowledging that the child is his, and upon consent of the mother, or if she is deceased or incompetent, or has surrendered custody, upon the consent of the person or agency having custody of the child, or of a court having jurisdiction over the child's custody, the probate court, if satisfied that the appellant is the natural father, and that establishment of the relationship is for the best interest of the child, shall enter the finding of fact upon its journal, and thereafter the child is the child of the applicant, as though born to him in lawful wedlock.

HISTORY: GC § 10503-15; 114 v 320 (342); 125 v 347 (Eff 10-14-53);136 v S 145, Eff 1-1-76.